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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

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No. 78-1683

MADALYN MURRAY O'HAIR

and

JON GARTH MURRAY, ET AL.,

Petitioners,

vs.

W. MICHAEL BLUMENTHAL, SECRETARY
OF THE TREASURY, ET AL.,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR J. G. WHITFIELD, INTERVENOR

Shannon H. Ratliff
Patton G. Lochridge

McGinnis, Lochridge & Kilgore
900 Congress Avenue
Austin, Texas 78701

Attorneys for Intervenor

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 588 F.2d 1144.

The opinion of the district court is reported in 462 F. Supp. 19.

JURISDICTION

The judgment of the Court of Appeals was entered February 5, 1979. The Petition for a Writ of Certiorari was filed on May 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 331 and 333 violate the Free Speech Clause of the First Amendment of the Constitution of the United States.

2. Whether 36 U.S.C. 186 violates the Establishment Clause of the First Amendment of the Constitution of the United States.

3. Whether 31 U.S.C. 324(a) violates the Establishment Clause of

the First Amendment of the Constitution of the United States.

4. Whether 31 U.S.C. 324, in that part which states, "The motto 'In God We Trust' shall be inscribed on all coins" violates the Establishment Clause of the First Amendment to the Constitution of the United States.

STATEMENT

Madalyn Murray O'Hair and Jon Garth Murray, Petitioners, filed their Original Complaint against W. Michael Blumenthal, et al., in this cause on September 1, 1974, which they amended on January 18, 1978, in the United States District Court for the Western District of Texas, Austin Division, invoking jurisdiction of that Court pursuant to 28 U.S.C. 1331 and 1346(2), and 28 U.S.C. 1402(a)(1). They asked

(1) that 31 U.S.C. 324 and 324(a) and 36 U.S.C. 186 be declared unconstitutional; (2) that Defendants be enjoined from enforcing 31 U.S.C. 324 and 324(a); and, (3) that Defendants be enjoined from using the National Motto "In God We Trust" in any way. The United States filed a Motion to Dismiss and Supplemental Motion to Dismiss on the grounds that Petitioners lacked standing and had failed to state a claim upon which relief could be granted.

On April 17, 1978, the district court granted the Motion to Dismiss, holding that Petitioners had failed to state a claim upon which relief could be granted. The district court concluded that the National Motto is ceremonial in nature and its present use has no religious significance or

impact; thus, its existence and use is not violative of the Establishment Clause. That Court also concluded that its inscription on coins and currency did not infringe upon anyone's right to freedom of speech. Petitioners timely filed their Notice of Appeal to the Fifth Circuit on May 16, 1978. On June 5, 1978, the Fifth Circuit granted J. G. Whitfield leave to intervene. Contrary to Petitioners' assertion, Intervenor is not a clergyman.

The Court of Appeals, on February 5, 1979, in a per curiam decision, affirmed the decision of the district court.

REASONS FOR DENYING THE WRIT

The primary thrust of Petitioners' Petition for Certiorari is their

contention that somehow they are compelled to espouse the literal meaning of the National Motto "In God We Trust" in violation of the First Amendment Free Speech Clause by their use of coins and currency bearing the phrase. As the Supreme Court has indicated, their position is without merit.

A necessary postulate for the Petitioners' position is that in using and carrying coins and currency Petitioners are affirming or propagating the ideals which may underlie any inscriptions located thereon. However, the mere use and handling of coins and currency lack an element necessary to the existence of an affirmation of belief--a communication or a communicative act. When one carries or uses coins, one clearly

does not "say" anything, nor is such activity the sort that would convey a communication. Consequently, there is no affirmation of belief in the literal meaning of "In God We Trust" when one uses or carries coins or currency.

The Supreme Court apparently arrived at this very conclusion in Wooley v. Maynard, ___ U.S.___, 97 S. Ct. 1428 (1977). Although the Court held that the required display of a state motto on a car license plate had the effect of making the owner of that automobile "an instrument for fostering public adherence" to the viewpoint expressed in the state motto, the Court was careful to ground its decision on the unique medium used by New Hampshire, the automobile. The Court explicitly noted the difference in character between an automobile and

coins and currency in footnote 15 of its opinion.

> It has been suggested that today's holding will be read as suggesting the obliteration of the National Motto, 'In God We Trust,' from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the National Motto. Wooley v. Maynard, supra at _____, n.15, 97 S. Ct. at 1436, n.15.

The essential underpinning to the Court's rationale in Wooley was the fact that an individual was required to publically advertise the state's message. This essential fact, as the Court observed, is not present in the case of bearing currency; consequently

there is no required affirmation of belief or opinion. See Wooley v. Maynard, supra (Rehnquist dissenting).

Petitioners speak of the right of "freedom from religion." The only "freedom from religion" under the Constitution is that which is embodied in the Establishment Clause: freedom from the establishment of religion by the government. The statutes of which Petitioners complain do not violate the Establishment Clause as the Ninth and Fifth Circuits have held, Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); O'Hair v. Blumenthal, 588 F.2d 1144 (5th Cir. 1979), and as the Supreme Court has indicated. Eg., School District of Abington Township, Pa. v. Schempp, 374 U.S. 203, 83 S. Ct. 1560 (1963) (Brennan, J., concurring), Engel v. Vitale, 370 U.S. 421 at 435,

n.21, 82 S. Ct. 1261, at 1269, n.21 (1962); Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679 (1952).

The simple truth is the National Motto is nothing more than that, a national motto. It has no religious significance; its importance lies in its ceremonial or patriotic value as a reflection of this country's religious heritage. Justice Brennan stated this fact succinctly in School District of Abington Township Pa. v. Schempp, supra:

> This rationale [that the Establishment Clause does not prohibit government action simply because it harmonizes with some religious doctrine] suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause . . . . The truth is that we have simply interwoven the motto so deeply into the fabric of

> our civil polity that its present use may well not present the type of involvement which the First Amendment prohibits. 374 U.S. at 303, 83 S. Ct. at 1614.

Absent any realistic religious connotations in the National Motto, there can be no violation of the Establishment Clause.

A quick glance at the National Motto through the trifocal lenses of the Establishment Clause test set out in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105 at 2111 (1971) clearly shows the lack of merit in Petitioners' position. The secular purpose is clear: adopt a motto that will inspire the American public. A motto which reflects the historical fact that this country has a strong religious heritage serves this purpose. This country's religious heritage is

a source of pride for most Americans, even if individually they do not share the actual religious beliefs of their forefathers. The National Motto's primary effect neither advances nor inhibits religion; rather, it stirs the patriotic heartstrings of Americans as they are reminded of the powerful strength of the convictions held by their ancestors. Finally, the passive use of the National Motto offers no danger of entanglement of the State with religion.

Also demonstrative of the weakness of Petitioners' arguments is an analysis of the National Motto in the context of the objective of the Establishment Clause, the prevention of "sponsorship, financial support and active involvement of the sovereign in religious activity." Walz v. Tax

Commission of N.Y., 397 U.S. 664, 668, 90 S. Ct. 1409, 1411 (1970). By no stretch of the imagination could one conclude that the adoption of the National Motto and its inscription on coins and currency realistically involve any one of these dangers. As Justice Goldberg so aptly stated in his concurrence in School District of Abington Township, Pa. v. Schempp, supra at 208, 83 S. Ct. 1560, 1616:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Supreme Court precedent indicates that beyond any shadow of doubt Petitioners would be unable to prove a set of facts in support of their claim which would entitle them to relief. The dismissal of their claim by the district court and its affirmance by the Fifth Circuit was correct in every respect. Conley v. Gibson, 355 U.S. 41, 45-6, 78 S. Ct. 99, 102 (1957).

CONCLUSION

For the reasons stated hereinabove, Petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Shannon H. Ratliff
Patton G. Lochridge

McGINNIS, LOCHRIDGE & KILGORE
Texas State Bank Building
900 Congress Avenue
Austin, TX 78701
512/476-6982

ATTORNEYS FOR INTERVENOR

June 4, 1979